No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

APPELLANTS' REPLY BRIEF REGARDING STANDING

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

October 20, 2015

Counsel for Appellants Robert J. Wittman, Bob Goodlatte, Randy J. Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor & Frank Wolf

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

APPELLANTS' REPLY BRIEF REGARDING STANDING 1

I. APPELLANTS HAVE STANDING 2

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) ..... *passim*

Clinton v. City of New York,
524 U.S. 417 (1998) 6, 7

Davis v. FEC,
554 U.S. 724 (2008) 8

Diamond v. Charles,
476 U.S. 54 (1986) 2, 7

Kirkpatrick v. Preisler,
390 U.S. 939 (1968) 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 8

Meese v. Keene,
481 U.S. 465 (1987) 1, 2, 8

Sanks v. Georgia,
401 U.S. 144 (1971) 10

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014) 6, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Swann v. Adams,
385 U.S. 440 (1967) 1, 2

United States v. Hays,
515 U.S. 737 (1995) 4, 5

United States v. SCRAP,
412 U.S. 669 (1973) 7

Vieth v. Jubelirer,
541 U.S. 267 (2004) 8

Whitcomb v. Chavis,
396 U.S. 1064 (1970) 9

White v. Weiser,
412 U.S. 783 (1973) 9

STATUTES

28 U.S.C. § 1253 9

Va. Stat. § 24.2-515 10

Va. Stat. § 24.2-521 10

Va. Stat. § 24.2-522 10

OTHER AUTHORITIES

Sup. Ct. R. 18 9

APPELLANTS' REPLY BRIEF REGARDING STANDING

Plaintiffs' and Defendants' briefs resoundingly confirm that Appellants face "direct injury" from the three-judge court's judgment and, thus, have standing to appeal. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618, 624 (1989). Plaintiffs and Defendants do not dispute that any remedy necessarily requires altering at least one Republican district where an Appellant has voted and been elected. *See* Pl. Br. 7-15; Def. Br. 8-9. Thus, under the undisputed facts, Appellants clearly have standing to appeal because the judgment mandates a remedy that will directly affect at least one Appellant's "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474 (1987), and interests as a Republican voter, *Swann v. Adams*, 385 U.S. 440 (1967); *see* App. Br. 1-2, 7-15.

Plaintiffs nonetheless argue that Appellants lack standing because (1) any injury to Appellants' clear interest in maintaining the existing districts is not "cognizable" because Appellants have no "legal right" to those districts, and (2) the injury will not be sufficiently certain until the lower court enters a remedy (within the next few weeks) detailing the *extent* of the injury. The first argument fundamentally confuses what *plaintiffs* must show in district court to challenge a *law* and the injury *defendants* must show on appeal to challenge a *judgment* invalidating a law, and would create a rule denying appellate standing to virtually *every* defendant. The second argument seeks to impermissibly convert the requirement that appellants show an "immediate threat" of direct injury into a rule requiring that appellants await

subsequent orders to *confirm* the precise *scope* of the injury. Moreover, awaiting entry of a remedial order before reviewing liability here would create massive confusion for Virginia voters in the 2016 elections and/or effectively deny Appellants timely relief.

I. APPELLANTS HAVE STANDING

Appellants have standing to appeal because the "judgment" causes them "direct, specific, and concrete injury" redressable by appellate reversal. *ASARCO*, 490 U.S. at 623-24. Plaintiffs and Defendants do not dispute that the three-judge court's finding of a *Shaw* violation requires a remedy that swaps black (and largely Democratic) voters from District 3 with non-black (far less Democratic) voters from one or more of the four adjacent districts, *all* of which are represented by a Republican Appellant. Pl. Br. 8-15; Def. Br. 8-9. This harm to at least one Appellant's "chances for reelection," *Keene*, 481 U.S. at 474, and voting strength as a Republican voter, *Swann*, 385 U.S. at 443, provides "a direct stake in the outcome" and, therefore, standing to appeal, *Diamond v. Charles*, 476 U.S. 54, 66 (1986); App. Br. 7-15.

Plaintiffs, however, ask the Court to dismiss this appeal and to delay its review on liability until an appeal from the remedial order, which Plaintiffs expect to issue within the next few weeks. *See* Pl. Br. 14-15. Yet such a delay would be both pointless—because Appellants' clearly have standing to appeal now—and positively harmful, because it will create enormous confusion for Virginia's voters, candidates, and election officials in the fast-approaching 2016 elections, as well as effectively deny Appellants timely relief from the erroneous judgment below.

1. Plaintiffs assert that a defendant's standing to appeal, like a plaintiff's standing to challenge a law in district court, turns on whether the judgment violates the appellant's "constitutional or statutory" "*rights*." Pl. Br. 15. But, of course, *defendants* never assert a violation of *rights* (except as a counterclaim) when they are sued. Rather, a defendant's "legally cognizable interest" on appeal is not that the challenged *law* violated its rights, but that the *judgment* erroneously deprives it of the benefits of the law it is *defending*. Thus, the *ASARCO* intervenors had a "legally protectable interest" in preserving the leases threatened by the holding that they should have been granted pursuant to competitive bidding, even though the intervenors did not assert any legal *right* to receive the leases without such bidding. 490 U.S. at 618. Indeed, defendants rarely if ever argue that the judicial remedy violates their legal rights; they assert only that the order threatens that which they possessed prior to the judgment being appealed—*e.g.*, money, unthreatened leases or, here, the districts which they helped draw to maximize their chances for reelection. Thus, Plaintiffs' radical "legal right" theory would deny virtually all defendants standing to appeal.[1]

---

[1] This fundamental difference between defendants' "interests" and plaintiffs' "rights" forecloses Plaintiffs' "absurd" notion that recognizing the "interest" Appellants have in maintaining their existing districts would somehow create a constitutional "right" in all "members of Congress" to preserve their districts. Pl. Br. 12. To use Plaintiffs' example, recognizing that incumbent members would be directly affected by a remedy which removes supportive "university communities" from their districts in no way depends upon, or suggests, a "right" to have those commu-

For the same reason, there is nothing to Plaintiffs' specific argument that defendants appealing a *judgment* finding a *Shaw* violation must establish the same injury as plaintiffs claiming that a *law* violates *Shaw*; *i.e.*, that they must reside in the allegedly gerrymandered district. Pl. Br. 8-10. As even Defendants note, this argument "conflate[s] what is needed to establish standing to assert a [*Shaw*] claim with what an appellant must show to have standing to challenge a judgment on appeal." Def. Br. 7.

United States v. Hays, 515 U.S. 737 (1995) (Pl. Br. 8), held that voters outside the gerrymandered district did "not allege a *cognizable* injury *under the Fourteenth Amendment*" because that Amendment only grants a "*personal*" right to "equal treatment" and the voters had not "suffered such [race-based] treatment." *Id.* at 746-47 (emphases added). Thus, *Hays* merely reaffirms the obvious proposition that those who have not been discriminated against have not suffered a Fourteenth Amendment injury, even if the "racial composition" of their district was affected by discrimination against *others*, just as non-minorities suffer no such injury when employment discrimination against minorities affects the composition of their workforce. *Id.* at 746 ("We have never held that the racial composition of a . . . voting district, without more, can violate the Constitution.").

Thus, *Hays* provides no support for Plaintiffs' baseless assertion that voters or representatives outside the gerrymandered district will not be "affected" or "injured" by altering the district. To the

---

nities in one's district. *Id.*

contrary, *Hays* noted that creating the gerrymandered district "of course" "*affects*" the "racial composition" of adjacent districts, but this did not violate the Fourteenth Amendment because any such effect was not motivated by a racial purpose. *Id.* at 746 (no "evidence that the Legislature intended [adjacent] District 5 to have any particular racial composition"). Here, in contrast, that negative effect, even though not racially motivated, provides standing because it produces the requisite "direct stake in the outcome" of the appeal. App. Br. 6-15.

Indeed, Plaintiffs' invented rule makes no sense because representatives and voters in adjacent districts are necessarily affected to the same extent as representatives and voters in the gerrymandered district because any remedial alteration of the population in District 3 will be precisely *equal* to the (cumulative) population alteration of the adjacent district(s). For example, Plaintiffs' Alternative Plan would simply swap 172,778 people between Districts 2 and 3, Int.-Def. Ex. 23, so it would be absurd to conclude, as Plaintiffs urge, that District 3's incumbent has standing to appeal but District 2's incumbent does not, Pl. Br. 8-10. Thus, *Hays* directly *supports* Appellants' standing, particularly because the effect on the adjacent district(s) is equivalent to the effect on District 3, where voters and representatives concededly have standing.

2. Plaintiffs also contend that Appellants' injury "is too speculative to meet Article III's standing requirements" until the three-judge court enters a remedy. Pl. Br. 10. Plaintiffs argue that, even though *any* remedy will alter at least one of Appellants' districts, standing arises only after a

remedial plan is entered and makes "clear" the *extent* of injury—*i.e.*, whether the alteration to districts is "relatively small" or "substantial enough" to likely cause Appellants to "los[e] a bid for re-election." *Id.* 13.[2] But appellants are not required to show that the decision will, at the conclusion of all judicial proceedings, wholly deprive them of what they enjoyed before the judgment. They are only required to show that the adverse decision creates an "immediate threat" to the pre-judgment status quo. *ASARCO*, 490 U.S. at 618; *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334; 2342 (2014) ("credible threat of prosecution").

Again, a defendant appealing a judgment "setting aside a verdict for the defendant" is not *definitively subjected* to a pro-plaintiff verdict on remand and the *extent* of plaintiffs' victory is not knowable at the time of the appeal. *Clinton v. City of New York*, 524 U.S. 417, 430 (1998). Nevertheless, it is axiomatic that such a defendant may appeal *before* the lower court takes further action on remand. *Id.* That is because defendants suffer cognizable injury from a judgment that puts them in a worse position; *i.e.*, being *exposed* to a *potential* adverse verdict after they had been immunized from such exposure. *See id.* There is no requirement that the judgment adversely affect the

---

[2] Plaintiffs also repeat their argument that standing to appeal arises only when a judgment orders the appellant "to do or refrain from" some action. Pl. Br. 10. As explained, this argument is meritless. *See* App. Br. 14. Plaintiffs, moreover, do not consistently embrace it: Plaintiffs concede that Appellants "may" have standing to appeal the remedy, but any remedy would not require them "to do or refrain from" any action. Pl. Br. 10, 14.

appellant to the *maximum* extent possible: the appellants in *Clinton* had standing prior to determining whether HHS would grant them the waiver *guaranteed* by the vetoed legislation, and the petitioners in *ASARCO* had standing prior to determining whether the remedy would deprive them of the leases. *Id.*; *ASARCO*, 490 U.S. at 618. Thus, here, since the decision below necessarily alters the pre-decision status quo (with at least the potential for re-election harm), Appellants have standing to appeal, regardless of whether subsequent judicial proceedings subject them to the worst possible injury.

Moreover, the *extent* to which the alteration of Appellants' districts hinders their re-election chances is irrelevant, so it is immaterial whether the remedial order's changes to the district are what Plaintiffs deem "relatively small." First, even a "small" injury supplies standing. *Diamond*, 476 U.S. at 67. This is particularly true in the electoral context, where the Court has found standing over what might otherwise seem to be a "trifle," such as a "fraction of a vote" or a "$1.50 poll tax." *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

Moreover, Plaintiffs' proposed rule that standing is available only if the district has been altered "substantially enough that the reduction is likely to harm the representative's current chances at re-election," Pl. Br. 13, is not only contrary to precedent, but also entirely unworkable and counter-productive. Apparently, Plaintiffs contemplate some sort of mini-trial or evidentiary showing, even after a remedial order has been entered, where the Court makes a *de novo* district-specific prediction about each representative's chances for re-election and then

determines whether the diminution is sufficient "enough" to constitute injury. Only then would appellants have standing to appeal. But political prognostication is both notoriously imprecise and beyond the judicial ken and, in any event, Plaintiffs' "enough" standard cannot be reduced to a "judicially manageable standard." *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 281-82 (2004) (plurality op.). Presumably that is why the Court has never hinted at such an inquiry when it has found standing to appeal in other contexts which have far less direct effect on re-election prospects than that present here. *Keene*, 481 U.S. at 474; *Davis v. FEC*, 554 U.S. 724 (2008).

Anyway, as a factual matter, the undisputed record here plainly establishes sufficient harm to re-election chances under any rational standard. *See* App. Br. 12-13. As Plaintiffs note, even Appellants' own proposed remedies, which, needless to say, minimized the harm to the extent feasible, result in a 0.6% increase in Democratic vote share in *evenly-divided* District 2. Pl. Br. 11. This converts District 2 into a majority-Democratic district and has a tangible negative effect in a previous toss-up district that has repeatedly changed hands in recent history. *See* App. Br. 6-15. All other plans have a far larger negative effect on Appellants and, of course, Plaintiffs did not bring this suit to achieve *de minimis* alteration of District 3. Finally, Appellants' merits contention (which must be taken as true for standing purposes, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) is that the Enacted Plan maximizes Appellants' re-election prospects to the greatest extent feasible, thus rendering *any* alteration injurious to those prospects. J.S. 17-21, 35.

3. Finally, Plaintiffs' request to delay this Court's review for a remedial order is a transparent effort to deny meaningful review. Plaintiffs nowhere disclose the consequences of their request. The reason is plain: Plaintiffs' delay would allow two lower-court judges to impose a pro-Democratic remedial plan for the 2016 Virginia elections *before* Appellants could obtain review of their erroneous liability decision. Such an outcome would directly contravene Congress' directive that this Court's review is so crucial in redistricting cases that it must be made available to "any party" on direct appeal of a three-judge court's "order granting or denying" an injunction, even before a remedial plan is entered. 28 U.S.C. § 1253.

Plaintiffs and Defendants have informed the three-judge court that it must enter a remedy "at the earliest practicable opportunity after November 17, 2015," and no later than January 1, to avoid disruption to the 2016 election cycle. Order (DE 241); Def. Br. 4. But regardless of the precise timing, awaiting a remedy would delay this Court's review until after the 2016 elections. Even if a remedy issues in late November, jurisdictional briefing and the Court's order noting probable jurisdiction could be completed no earlier than February 2016, and would likely stretch even later. *See* Sup. Ct. R. 18. The Court would therefore not hold oral argument until the October 2016 term.

Two scenarios therefore are possible if the Court waits for a remedy to review liability. In the first, the Court could (and should) stay the remedy pending its review of liability. *See White v. Weiser*, 412 U.S. 783, 789 (1973); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968) (Mem.); *Whitcomb v. Chavis*, 396 U.S.

1064 (1970) (Mem.). But such a stay would unleash havoc: Virginia's 2016 election cycle would have already travelled a long way under the remedial plan, only to be shifted back mid-cycle to the different districts in the Legislature's Enacted Plan. The Court's stay would come after the January 2 commencement of the candidate signature collection period, and perhaps after the March 31 candidate qualifying deadline. Va. Stat. §§ 24.2-521; 24.2-522; 24-2.515. All administrative efforts would be wasted, candidate signatures and qualifications could be invalidated, and voters would be needlessly confused by such mid-cycle reshuffling of districts.

The second scenario—the Court denying a stay—is even worse. The 2016 election would proceed under a remedial plan whose liability underpinnings raise "substantial questions" that this Court would have concluded warrant its "plenary consideration." *Sanks v. Georgia*, 401 U.S. 144, 145 (1971). The Court thus might well *reverse* the liability decision underlying the remedial plan *after* the plan had been used in the 2016 elections. The irreparable injury to Appellants is self-evident, particularly because at least one Appellant would be compelled to seek and risk losing reelection in a majority-Democratic remedial district. *See* App. Br. 6-15. In similar circumstances, the Court has allowed pre-enforcement challenges precisely to avoid requiring parties to risk irreparable harm as the price of securing the Court's review. *See Susan B. Anthony List*, 134 S. Ct. 2334.

CONCLUSION

Appellants have standing to appeal.

Respectfully submitted,

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Appellants Robert J. Wittman, Bob Goodlatte, Randy J. Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor & Frank Wolf

October 20, 2015